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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 353

IN THE MATTER OF VINCENT BENDIX, BANKRUPT,

ARMIN F. HILLMER, AS REPRESENTATIVE OF CREDITORS OF CHICAGO BANK OF COMMERCE,

Petitioner,

vs.

VINCENT BENDIX,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT OF THE APPLICATION.

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THE BUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

Petitioner Armin F. Hillmer, as representative of creditors of Chicago Bank of Commerce, prays the issuance of a writ of certiorari to review a judgment of the Circuit Court of Appeals for the Seventh Circuit affirming, upon appeal, an order entered by the District Court of the United States for the Northern District of Indiana, South Bend Division, which order denied a petition for review from an order of a referee in bankruptcy dismissing specifications of objections to discharge and ordering the discharge of Vincent Bendix, bankrupt.

Summary Statement of the Matter Involved.

Petitioner, Armin F. Hillmer, as representative of the creditors of Chicago Bank of Commerce, recovered a judgment against the bankrupt, Vincent Bendix, against whom a petition in bankruptcy was filed on May 24, 1939 (R. 5). An order of adjudication was entered June 7, 1939 (R. 5). On August 22, 1940, specifications of objections to the discharge of the bankrupt were filed by petitioner (R. 25). Certain of the specifications having been dismissed, amended specifications were filed and hearings were held on the merits (R. 40-43). On April 17, 1941, the referee entered an order refusing the objecting creditor leave to file two further specifications of objections made to conform with the proof, dismissed all the specifications of objections, and ordered the bankrupt discharged (R. 228). A petition for review was filed (R. 229-33) and the matter heard by the district court without further proof. The district court denied the petition for review and affirmed the order of discharge (R. 237-38). Upon appeal to the Circuit Court of Appeals for the Seventh Circuit the order of the district court was affirmed (R. 265) on April 23, 1942. Petition for rehearing was filed May 8, 1942 (R. 269-86). On May 15, 1942, the bankrupt answered the petition for rehearing (R. 291-97). On June 3, 1942, petition for rehearing was denied.

Jurisdiction of the Court.

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code, as amended by the act of February 13, 1925, and Section 24(c) of the Bankruptcy Act; 11 U. S. C. 47(c). The decision hereby sought to be reviewed was entered April 23, 1942, and petition for rehearing was denied June 3, 1942. The opinion (R. 260-64) is reported at 127 Fed. (2d) 759 as *In re Bendix.*

Questions Presented.

1. Whether under Section 14 of the Bankruptcy Act (11 U. S. C. 32) a court of bankruptcy is justified in placing the burden of proof upon the objecting creditor even though a number of associates of the bankrupt have surrendered to the trustee substantial sums of cash and valuable property.

2. Whether under Section 14 of the Bankruptcy Act (11 U. S. C. 32) a court of bankruptcy is justified in placing the burden of proof upon the objecting creditor even though the bankrupt has, under the terms of a turnover order, been found to have made a transfer while insolvent for the purpose, and with the effect, of hindering, delaying and defrauding his creditors.

3. Whether under the provisions of Section 14 of the Bankruptcy Act (11 U. S. C. 32) a court of bankruptcy is justified in refusing to consider assets surrendered to the trustee and assets ordered to be turned over to the trustee, as having been conveyed in fraud of creditors, as evidence of concealment of assets.

4. Whether the Federal Court is justified in refusing to recognize the right of a creditor of an Illinois Bank to represent all creditors in prosecuting claims against a stockholder of said bank.

5. Whether a court of bankruptcy is justified in discharging a bankrupt whose books omit substantial transactions and contain material false entries.

6. Whether a court of bankruptcy is justified in ratifying a bargain relating to the subject of discharge.

Reasons Relied Upon for the Allowance of the Writ.

1. The Circuit Court of Appeals for the Seventh Circuit has rendered a decision in conflict with a decision of the First Circuit Court of Appeals upon the same point.

2. The Circuit Court of Appeals has erroneously decided a question of Illinois law in conflict with the statute of Illinois and the decisions of the Illinois courts.

Prayer.

WHEREFORE, petitioner prays that this court may issue its writ of certiorari to review the aforesaid judgment of the Circuit Court of Appeals for the Seventh Circuit, and that the said decision may upon review be reversed.

ARMIN F. HILLMER, *as representative of creditors of Chicago Bank of Commerce,*

Petitioner.

GEORGE EDWARD LEONARD,

Counsel for Petitioner.

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Petitioner,

vs.

VINCENT BENDIX,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

The order of the referee (R. 220-28) and the order of the district court (R. 237-39) are not reported. The opinion of the Circuit Court of Appeals is reported as *In re Bendix*, 127 Fed. (2d) 759.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240-A of the Judicial Code, as amended by the act of February 13, 1925, and Section 24(c) of the Bankruptcy Act, 11 U. S. C. 47(c). The decision hereby sought to be reviewed was entered April 23, 1942, and petition for rehearing was denied June 3, 1942.

STATEMENT OF FACTS.

Vincent Bendix was adjudicated bankrupt on June 7, 1939 on a petition filed against him on May 24, 1939 (R. 5). His net worth, as shown by his books, diminished from $38,000,000 on June 30, 1929 to $2,128,000 on December 31, 1935, $1,297,000 on December 31, 1936, and $1,053,000 on the date of the filing of the petition (R. 6). Bendix's actual net worth, if any, on June 29, 1931 was less than $3,000,000 (R. 6). Bendix realized that he was in financial difficulties in and after the year 1931 (R. 6). During the period that the net worth of Bendix was falling rapidly, the bankrupt was transferring property to members of his family and business associates for no consideration or inadequate consideration (R. 7). On January 29, 1931, the bankrupt made a voluntary transfer of an art collection, previously acquired by him at a cost of more than six hundred thousand dollars, to the Bendix Gallery Foundation for Arts and Crafts. Thereafter, the trustees of the Bendix Gallery transferred the collection voluntarily to the Bendix Foundation, a corporation, which retained possession and control of the collection until after the date of the bankrupt's adjudication (R. 5). Bendix was one of the trustees of the foundation, as were business associates and close friends of the bankrupt, dominated by the bankrupt (R. 6). The bankrupt for all practical purposes retained control of the collection (R. 6). Upon petition by the trustee, the court entered an order that the collection be turned over to the trustee (R. 5-9). The court found that the transfer had been made for the purpose, and had the effect, of hindering, delaying, and defrauding the creditors of Vincent Bendix (R. 7).

The trustee in bankruptcy asserted claims against Walter J. Buettner, Herbert L. Sharlock, George C. Fleener,

Thomas A. McGrath, Elizabeth Blake, Ruth Bendix Robinson, Elmer M. Kasdorf, Jersey Farms, Inc.; Bendix Realty Corporation, Limited; and General Realty Company as transferees of the bankrupt. The trustee filed a petition for leave to compromise these claims (R. 9-22). The trustee was authorized to release his claims against the individuals and corporations aforesaid upon the surrender to him of certain property and money (R. 23-25). The transferees together paid more than $50,000 and surrendered to the trustee the entire capital stock of General Realty Company and the Colfax Corporation, the entire capital stock of Jersey Farms, Inc.; 30,000 shares of Bendix Home Appliance, Inc. Class "B" stock, and certain other properties in return for a general release of all claims by the trustee (R. 23-24). At the outset of the hearing on objections to discharge, the attorney for the objecting creditor requested the court in view of the Bendix Foundation turnover litigation and the order approving the compromise to rule that the burden of proof lay upon the bankrupt (R. 271-272). This request was denied (R. 272).

The men with whom Bendix dealt in these transactions were particularly close to the bankrupt both in business affairs and in personal friendship. Walter J. Buettner was the bankrupt's financial adviser for many years. He was an officer in numerous corporations with which the bankrupt was identified (R. 55). Buettner, by his own testimony, at one time was an extremely wealthy man because of his close association with the bankrupt (R. 196). Thomas A. McGrath was an attorney who had from time to time handled certain legal matters for the bankrupt, had many transactions both with the bankrupt and his close associates, and was a social acquaintance of Bendix (R. 65, 180-1). Herbert L. Sharlock had been associated with the bankrupt for a period of twenty years. He had acted as the bankrupt's public relations counsel and had charge

of his personal publicity (R. 57, 180-1). He was employed during the greater part of the twenty years' association by the corporations with which the bankrupt was identified. George C. Fleener had been associated with the bankrupt since 1929. He had spent a substantial portion of his time handling the bankrupt's personal affairs and was a very close friend of the bankrupt (R. 55, 57). Elmer M. Kasdorf had been associated with the bankrupt for a period of eighteen to twenty years (R. 67, 168). During that time he rendered many personal services to the bankrupt while he was employed by one or more of the corporations with which the bankrupt was identified. Ruth Bendix Robinson was the bankrupt's adopted daughter (R. 57).

The bankrupt's only listed stock in and after 1935 consisted of a block of shares of Automatic Products Company (R. 133), representing control of the company (R. 68), which he had acquired at a cost of more than $1,000,000 (R. 67). This investment was liquidated under the direction of Fleener (R. 139). Fleener organized the Lakeside Investment Company, together with Buettner and Kasdorf, to trade in and borrow upon stock of Automatic Products (R. 118). In the year 1935 Lakeside had profits of approximately $15,000, which was paid to Bendix Limited of California (R. 120). Bendix Limited of California was a corporation without resources managed by Fleener (R. 95, 124). December 16, 1935, it gave its notes to the stockholders of Lakeside for the par value of all shares of stock in Lakeside. Bendix Limited of California was, accordingly, the stockholder of record when the $15,000 dividend was paid fourteen days later (R. 121). Some months later the transaction was reversed by the cancellation of the notes of Bendix Limited of California and the return of the shares to the original stockholders, but Bendix Limited of California retained the $15,000 dividend (R. 120-21). In December, 1936, Bendix Limited of California

again purchased the stock at par and received the liquidating dividends which exceeded the par value of the stock (R. 119). Buettner, one of the principal stockholders of Lakeside who repurchased his shares from Bendix Limited of California minus the dividend paid immediately after its sale by him, testified that with one exception he could recall no purchase of an asset of $15,000 in the last five years; that his problem had been one of liquidation (R. 191). Bendix Limited of California, enriched by more than $20,000 from its nominal investment in Lakeside, elected to pay Ruth Bendix Robinson in 1938 slightly more than $20,000, $10,000 in purchase of its own stock and the balance in repayment of advances made by the bankrupt (R. 63, 98). The latter payment was by check dated October 22, 1938, approximately six months before the bankruptcy (R. 63). The account due the bankrupt from Bendix Limited was written off on his books November 16, 1935 (R. 205-08). The note of Bendix Limited, representing the amount due on the account, was dated December 31, 1935 (R. 99). The bankrupt testified that he had given the account receivable to his daughter in 1932 or 1933 (R. 98). The last advances included in the account were made October 3, 1935 (R. 208). The bankrupt testified that his daughter gave him the proceeds of the check (R. 63). The bankrupt subsequently testified that the daughter had devoted the proceeds of the check to the payment of obligations of the bankrupt, who, in turn, invested a similar amount of money in Jersey Farms, Inc. (R. 98). Jersey Farms, Inc. was a corporation whose principal asset was a $6,000 piece of land with a farmhouse remodeled at an expense of $18,000 (R. 61). The occupant of this farmhouse was a woman that the bankrupt was "practically engaged to" (R. 63). The stock of Jersey Farms was surrendered to the trustee (R. 23-24).

According to his books, the bankrupt sold his last block of stock in Automatic Products amounting to 7,286 shares

to Fleener on May 25, 1938 at $1 per share (R. 141, 207). Fleener testified that he had paid Bendix only $1 a share for 7,286 shares, which was an exact split of the bid and ask price (R. 141). Some ten weeks later, Fleener sold 13,000 shares at $2.50 per share, which amounted to Fleener's total holding at the time and included the 7,286 shares obtained from Bendix (R. 138). *The bankrupt testified that he sold his last block of stock in Automatic Products, consisting of 13,000 shares, to Fleener for $2 per share, which was above the market price* (R. 95). On July 20, 1938, Fleener bought from McGrath $25,000 worth of common stock in Bendix Home Appliances (R. 151). Bendix Home Appliances is a corporation organized and promoted by Bendix (R. 89-90). Fleener is treasurer of the corporation (R. 63) and obtained his position through Bendix's influence (R. 151).

On December 31, 1934 the bankrupt wrote off his investment in Commercial Instrument Company notes (R. 204). At the same time Fleener and David Beecroft, on behalf of the bankrupt, were working out a transaction by which the bankrupt obtained the controlling interest in stock of the Connecticut Telephone & Electric Company in exchange for the Commercial Instrument notes (R. 117, 118). In January, 1935, the bankrupt agreed to sell his interest in Connecticut Telephone & Electric Company to Herbert L. Sharlock for $45,000 (R. 87, 118, 181). Sharlock turned the stock over to McGrath, who sold it for precisely the price which Sharlock had agreed to pay Bendix (R. 150, 181, 184). The stock was sold to Automatic Products Company, or one of its subsidiaries (R. 160). In December, 1937, Sharlock received $10,000 from McGrath which Sharlock described as "profit" (R. 182), although he did not know at what price the stock was sold nor what profit, if any, McGrath had made (R. 183). McGrath's letter of transmittal stated

that he was paying Sharlock $3,748 interest and $6,643 as a "finder's fee" (R. 184). In December, 1938, Sharlock received an additional $15,000 cash from McGrath and 30,500 shares of Bendix Airport, Inc. of New Jersey (R. 183, 184). Bendix accepted the $15,000 cash and 30,000 shares of the Airport stock in full discharge of his claim against Sharlock (R. 100). The stock was worthless (R. 13, 212.) In March, 1938, (three months after the receipt of the check from McGrath), Sharlock organized the Colfax Corporation, with a paid in capital of $10,000 (R. 185). The Colfax Corporation issued $20,700 par value non-cumulative preferred stock in exchange for the clubhouse property, which was part of the property which the bankrupt had purchased as a residence in 1929 and which later became an asset of the General Realty Corporation (R. 75, 185). No dividends were ever paid on the preferred stock and the corporation had no income (R. 185). The entire stock of the corporation was surrendered to the trustee in bankruptcy (R. 185).

In 1935 the bankrupt sold 1,600 shares of stock in First Bank and Trust Company of South Bend which had cost him $200,000 (R. 205.) 1,500 shares of the stock were sold in a period of less than two months, although there was no market for the stock in substantial quantities (R. 206, 72, 216). It was sold to friends of the bankrupt, whose names he could not recall (R. 72). The books did not indicate to whom the shares were sold (R. 205). 400 shares of the stock were sold to Kasdorf, who borrowed the entire purchase price from the Archaeological Trust (R. 169). The loan was made through and with the help of Fleener (R. 169). Thereafter the stock was re-hypothecated with Fleener for a larger amount of indebtedness, incurred by Kasdorf in the course of his trading in Automatic Products stock (R. 170). Fleener in 1938 cancelled Kasdorf's indebtedness, which then

amounted to approximately $25,000, and proceeded to liquidate the stock at prices above $80 per share (R. 154). Kasdorf made no investigation of the value of the stock before his purchase or before its sale (R. 171).

Specification of Errors.

1. The court below erred, under Section 14 of the Bankruptcy Act (11 U. S. C. 32) in placing the burden of proof upon the objecting creditor even though a number of associates of the bankrupt had surrendered to the trustee substantial sums of cash and valuable property.

2. The court below erred, under Section 14 of the Bankruptcy Act (11 U. S. C. 32) in placing the burden of proof upon the objecting creditor even though the bankrupt had, under the terms of a turnover order, been found to have made a transfer while insolvent for the purpose, and with the effect, of hindering, delaying and defrauding his creditors.

3. The court below erred, under the provisions of Section 14 of the Bankruptcy Act (11 U. S. C. 32) in refusing to consider assets surrendered to the trustee and assets ordered to be turned over to the trustee, as having been conveyed in fraud of creditors, as evidence of concealment of assets.

4. The court below erred in refusing to recognize the right of a creditor of an Illinois Bank to represent all creditors in prosecuting claims against a stockholder of said bank.

5. The court below erred in discharging a bankrupt whose books omit substantial transactions and contain material false entries.

6. The court below erred in ratifying a bargain relating to the subject of discharge.

ARGUMENT.

I.

The Court Below Refused to Consider the Recapture of Assets by the Trustee as Evidence of Concealment Sufficient Even to Shift the Burden of Proof.

The provisions of the Bankruptcy Act governing the discharge of the bankrupt pertinent to this case are as follows:

> "c. The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under this Act; or (2) destroyed, mutilated, falsified, concealed, or failed to keep or preserve books of account or records, from which his financial condition and business transactions might be ascertained, unless the court deems such acts or failure to have been justified under all the circumstances of the case; or (3) * * *; or (4) at any time subsequent to the first day of the twelve months immediately preceding the filing of the petition in bankruptcy, transferred, removed, destroyed, or concealed, or permitted to be removed, destroyed, or concealed, any of his property, with intent to hinder, delay, or defraud his creditors; * * *; or (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: Provided, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision c, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt." (Bankruptcy Act, Sec. 14, 11 U. S. C. 32.)

In the case of *Huntley* v. *Snider*, 86 F. (2d) 539, assets had been transferred by the bankrupt to his wife more

than one year before the filing of a petition in bankruptcy. The trustee in bankruptcy asserted a claim against the wife for the return of the property, which claim was compromised. The referee found that the bankrupt's discharge should be denied, placing reliance upon the fact that the bankrupt's wife had paid money to the trustee in settlement of the claim against her. The ruling of the referee was sustained in the District Court *In re Huntley,* 14 F. Supp. 784. Upon appeal the ruling of the trial court was sustained in the case of *Huntley* v. *Snider,* 86 F. 2nd 539, the court stating at page 540:

> "The referee reported that 'To sustain my findings of fraudulent intent and continuing concealment of assets from the trustee, it is necessary for me to rely in part upon the fact that Mrs. Huntley paid $13,000 in equal amounts to the two trustees in bankruptcy, namely Mr. Makepeace and Mr. Hathaway, in full settlement of their claims against her, said claims being based upon the various transfers of property described in the two petitions to compromise' Judge Brewster held that the referee was right in considering in connection with other facts disclosed the circumstance that the bankrupt's wife on demand by the trustee had returned to the estate a substantial part of the property conveyed to her by her husband as above stated; that such evidence was relevant on the questions whether there were assets and whether the bankrupt knew of them and intended to conceal them. We think the ruling was clearly right. The rule that offers of compromise will not be received as admissions of liability applies only between parties and has no application to a completed transaction as shown by the facts here presented. 2 Chamberlayne on Evidence, Sec. 1442. We perceive nothing in the circumstances surrounding the return of the property to make what was done inadmissible. It clearly appeared that the bankrupt had made many voluntary transfers of property to his wife under circumstances which left no doubt that they were made in pursuance of some plan. The special master found that such was the fact and that

> the plan was to conceal the property and defraud the transferor's creditors. The return to the trustee by the wife of a portion of the property so transferred to her was relevant for the reasons stated by Judge Brewster."

Upon rehearing, the Circuit Court held that the trustee was not estopped by the settlement with the wife to prosecute objections to discharge and that the concealment of assets was not excused because the trustee subsequently discovered and recaptured the assets. *Huntley* v. *Snider*, 88 F. (2d) 335.

In the present case the bankrupt made transfers both before and during the statutory period of one year preceding the filing of the petition. In the present case the trustee compromised not with one transferee of the bankrupt but seven individuals and recovered the stock or assets of four corporations (R. 9-22). In the present case the trial court found that the bankrupt more than eight years before the filing of the petition had made a transfer with the purpose and effect of hindering, delaying, and defrauding his creditors; that even then he was insolvent or upon the verge of insolvency and was aware of his financial condition; and that the transfer might have been pursuant to a plan to conceal his assets (R. 5-9). In the face of this finding the Circuit Court states:

> "His business associates were able to and did make some substantial profits out of their transactions with Mr. Bendix. But there is not one scintilla of evidence that the property or the proceeds therefrom were held for Mr. Bendix or that any of such property or proceeds ever found its way back into his hands." (R. 262.)

This statement, in view of the record, is squarely opposed to the ruling in the *Huntley* case that the surrender of properties to the trustee in compromise of claims against transferees of the bankrupt may be considered on the questions of whether there are assets and whether the

bankrupt attempted to conceal them. If any part of the property surrendered to the trustee was in fact the property of the bankrupt, then a continuing concealment is established and the time of the purported transfers becomes irrelevant.

In re: James, 173 F. 894; aff'd 181 F. 476; appeal dismissed 227 U. S. 410.

In re: Ulrich, 95 F. (2d) 1018, affirming 18 F. Supp. 919.

In re: Patrizzo, 105 F. (2d) 142.

The Circuit Court of Appeals states in its opinion that:

> "We have no way of knowing whether the lower court considered the burden was upon the objecting creditor or upon the bankrupt." (R. 262.)

This statement of the trial court was adhered to upon denial of rehearing (R. 299), although the objecting creditor called to the court's attention the ruling appearing in the stenographic transcript of record, on file with the said Circuit Court of Appeals, in which the referee held that despite the findings in the Bendix Foundation turnover order and the facts of the trustee's compromise, the burden of proof would not be shifted to the bankrupt but would be placed upon the objecting creditor (R. 271-272).

It is, therefore, clear that while in the First Circuit the action of the referee in denying a discharge was sustained, although he *necessarily relied upon* the fact of the compromise, such facts in the Seventh Circuit do not constitute "reasonable ground for believing that the bankrupt has committed any of the acts which under this subdivision (c) would prevent his discharge".

II.

A Representative Creditor, After Obtaining a Decree Against a Stockholder in an Illinois Bank May Enforce That Decree on Behalf of All Creditors in Bankruptcy Proceedings.

Apparently the perfunctory treatment accorded the appellant in the court below is due to the court's tacit application of the maxim *de minimis non curat lex.* The court, in its opinion, contrasts the size of the claims against the bankrupt with the claim of the objecting creditor, which it states to be $85 (R. 261). The fact of the matter is, and the court was so apprised in the Reply Brief and Petition for Rehearing (R. 274), that the creditor's claim is based upon a judgment for more than $200,000, obtained by him as a representative of the depositors of the Chicago Bank of Commerce. This procedure is authorized by the Illinois Banking Act (Sec. 11, Ch. 16½, Ill. Rev. Stats.) which provides that:

> "* * * the individual liability of shareholders provided for by Section 6 of this Act may be enforced by any creditor of such (banking) association, by bill in equity, in the nature of a creditor's bill, brought by such creditor on behalf of himself and all other creditors of the association against the shareholders thereof."

This procedure has been approved by numerous decisions of the Supreme Court of Illinois, *inter alia, Golden* v. *Cervenka,* 278 Ill. 409, 116 N. E. 273; *Zimmerman* v. *Zeimer,* 363 Ill. 220, 1 N. E. 2d 854; *Continental Casualty Co.* v. *Hein,* 368 Ill. 289, 13 N. E. (2d) 984.

The court below, in its opinion, states that "the objecting creditor *claimed* to act for all the creditors of this bank" (italics supplied; R. 261). The objecting creditor's claim to represent the creditors of the bank is supported

by final decrees running into millions of dollars against the stockholders of the bank, which decrees have been affirmed by the Supreme Court of Illinois in *Hillmer* v. *Chicago Bank of Commerce*, 375 Ill. 266; 31 N. E. (2d) 309. The representative creditor is a proper party in bankruptcy of a stockholder. *Kape* v. *Home Bank*, 370 Ill. 170; 18 N. E. (2d) 170.

III.

A Discharge in Bankruptcy Should Not Be a Subject of Bargain and Sale.

The objecting creditor has consistently maintained that the only reason for the granting of the discharge in bankruptcy in this case was the deal by which the trustee in bankruptcy did not file or prosecute objections to discharge as to assets surrendered by the compromise and turnover order. The Bankruptcy Act makes it mandatory upon the trustee to participate in the prosecution of objections to discharge unless otherwise ordered by the court. The statute provides:

> "Duties of Trustees. (a) Trustees shall * * * (7) examine the bankrupt * * * (b) upon the hearing of objections, if any, to their discharges, unless otherwise ordered by the court." U. S. C. Title 11, Sec. 75 (a) (7).

The objecting creditor has protested and still protests that such deals are contrary to the policy of the bankruptcy law, which provides that:

> "A person shall be punished * * * upon conviction of the offense of having knowingly and fraudulently (5) received or attempted to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof from any person, for acting or forbearing to in any proceeding under this Act." U. S. C. Title 11, Sec. 52 (b) (5).

Bargaining for discharge is contrary to public policy. *Meyer* v. *Price*, 25 N. Y. 370.

In the present case the trustee did not file objections to discharge. He did not examine the bankrupt at the hearing on objections and he was not excused from such examination by order of court.

The facts in this case disclose an intricate and clever plan for concealment of assets followed by a shrewd agreement to disgorge in part as the price of a discharge. The settlement may well have been good business but it was not good morals. It should not have included the bankrupt's discharge. The writ of certiorari should be awarded.

Respectfully submitted,

ARMIN F. HILLMER, as representative of creditors of Chicago Bank of Commerce,

Petitioner.

GEORGE EDWARD LEONARD,

Counsel for Petitioner.

GORDON MCLEISH LEONARD,
MONRAD G. PAULSEN,

Of Counsel.

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Petitioner,

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VINCENT BENDIX,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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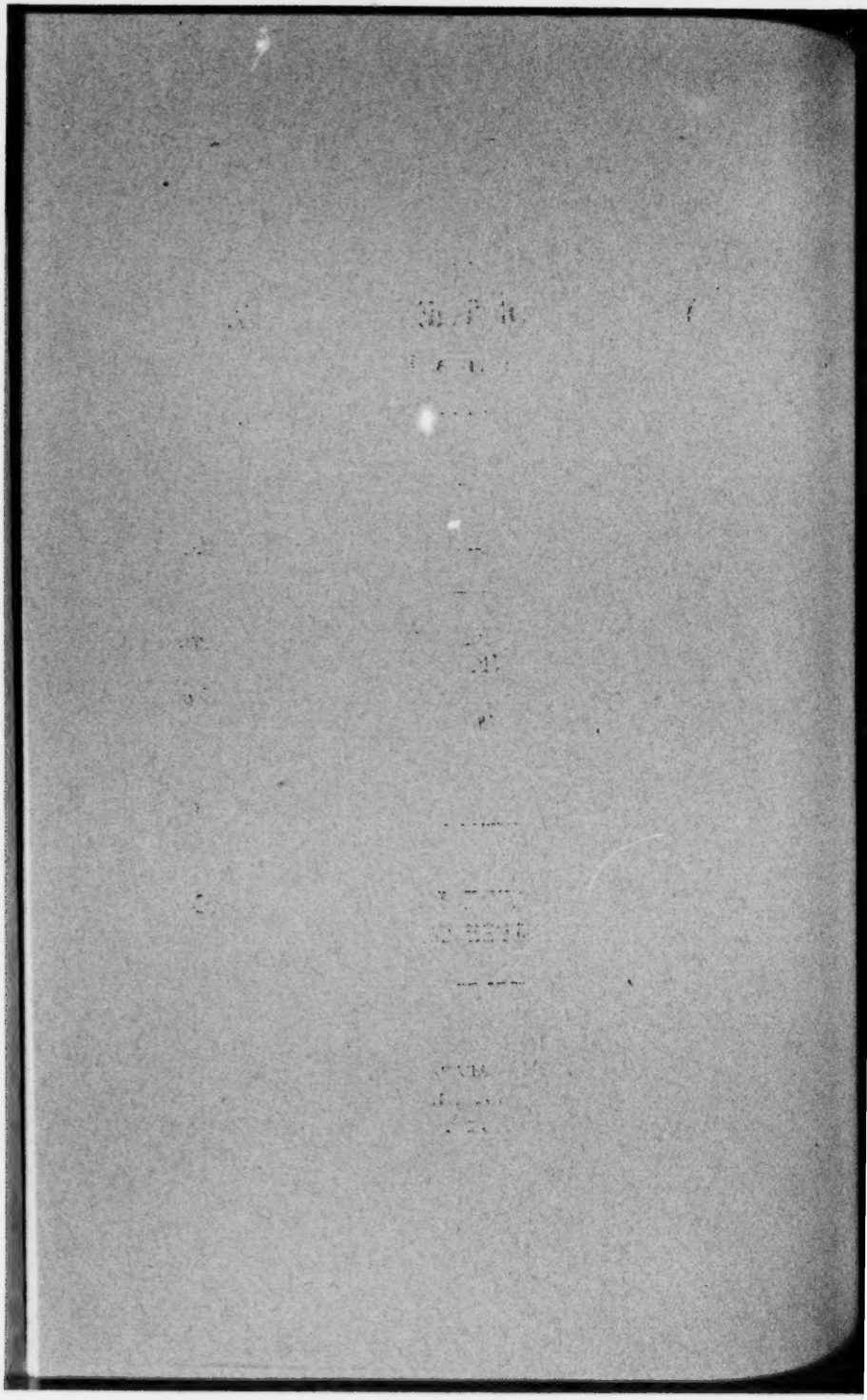

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1942

No. 353

IN THE MATTER OF VINCENT BENDIX, BANKRUPT.

ARMIN F. HILLMER, AS REPRESENTATIVE OF CREDITORS OF CHICAGO BANK OF COMMERCE,
Petitioner,

vs.

VINCENT BENDIX,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

MAY IT PLEASE THE COURT:

I.

STATEMENT OF THE CASE.

Petitioner has failed to comply with Supreme Court rule No. 27, Section 2 (d) in that he has not set forth in his brief a concise statement of the case. In lieu of this requirement he has set forth a detailed "statement of facts," (pages 6 to 12, incl. of his brief) which does not comply with the above rule and does not enable this Honorable Court to readily comprehend that which is material for the consideration of the questions presented.

II.

ARGUMENT.

SUMMARY OF THE ARGUMENT.

Point A.

The decision of the Circuit Court of Appeals of the Seventh Circuit In re Vincent Bendix, reported in 127 Fed. (2d) 759, is not in conflict with the decision of the Circuit Court of Appeals of the First Circuit. *Huntley* v. *Snider*, 86 F. (2d) 539 and 88 F. (2d) 335.

Point B.

The Circuit Court of Appeals for the Seventh Circuit has not erroneously decided a question of importance of Illinois law in conflict with the statutes of Illinois and the decisions of the Illinois courts.

Point C.

The first, second, third, fifth and sixth questions presented on page 3 of petitioner's petition and the first, second, third, fifth and sixth specification of errors on page 12 of petitioner's brief relate solely to the merits of the case and to questions of fact which are improper for consideration on a petition to this Court for a writ of certiorari.

Point D.

Petitioner has failed to comply with Supreme Court rule No. 27, Section 8, in that he failed to accompany the filing of his brief within the time required by satisfactory proof of service upon counsel for respondent.

Point E.

Petitioner in his petition (page 4) has failed to comply with Supreme Court Rule 38, Section 2, in that he has failed to set forth any reasons that can be relied upon for the allowance of the writ: (1) No reference is made to any decision of the Circuit Court of Appeals in conflict with the decision *In re Bendix;* (2) No claim is made that the alleged conflict with the Illinois law is a matter of importance, nor are the specific Illinois statutes or the specific decisions of the Illinois courts set forth, which are claimed to be in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit.

POINT A.

The decision of the Circuit Court of Appeals of the Seventh Circuit In re Vincent Bendix, reported in 127 F. (2d) 759, is not in conflict with the decision of the Circuit Court of Appeals of the First Circuit. Huntley v. Snider, 86 F. (2d) 539 and 88 F. (2d) 335; and Answer to Petitioner's Argument Point I.

There is no legal question presented by this petition and there is no question of importance presented by it. Petitioner apparently relies upon Section c, subsection (7) of Section 14 of the Bankruptcy Act, which provides as follows:

> "c. The court shall grant the discharge unless satisfied that the bankrupt * * * (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: Provided, That if, upon the hearing of an objection to a discharge, the objector shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which,

> under this subdivision c, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt." (Bankruptcy Act, Sec. 14, 11 U.S.C. 32.)

Petitioner does not contend that he has sustained the burden of proof on any one of the numerous specifications of objection, either original or amended, that he filed in this case. However, petitioner urges that in this case the burden was upon the bankrupt to prove that he had committed no act which would prevent his discharge. Faced with the failure of direct proof the petitioner bases his attack on the findings of the Referee, which were subsequently approved by the District Court and the Circuit Court of Appeals, primarily on this legal theory: That the compromise by certain business associates of the bankrupt of claims asserted against them, (to which the bankrupt was not a party) raises as against the bankrupt himself an inference that he had committed acts sufficient to bar his discharge.

One case, and only one case, has been cited for the legal proposition upon which the petitioner relies. Of this case, *Huntley* v. *Snider*, 86 F. (2d) 539, 88 F. (2d) 335, only one thing need be said. The case does not hold, as contended by petitioner, that compromises by third persons raise an inference against the bankrupt that he has committed acts to bar his discharge or place upon him the burden of proof. The case simply holds that such matters of compromise may be considered as evidence in the case along with all other facts and circumstances.

This case is not mentioned by the Court of Appeals in its opinion. The reason that it is not mentioned may be inferred, namely, because the Referee stated that he had considered all of the evidence which included evidence concerning the compromises.

Judge Minton, in his opinion in the Circuit Court of Appeals for the Seventh Circuit *In re Bendix*, 127 F. (2d) 759, at 760, with reference to the burden of proof said:

> "If the Referee and the District Court thought there was reasonable ground to believe the bankrupt had committed the alleged acts, then of course the burden shifted to the bankrupt to explain. That called for an exercise of discretion, after a consideration of the facts. We have no way of knowing whether the lower court considered the burden was upon the objecting creditor or upon the bankrupt. All we know is that after eight days of hearing testimony and piling up a record of 882 pages, the Referee found the charges were not sustained, and the District Court sustained the Referee."

All this case holds, or can reasonably be considered as holding, is that compromises between a trustee and third parties may be introduced in evidence and considered by the Referee along with all the other circumstances of the case. The language of the Circuit Court of Appeals of the First Circuit, found on page 14 of petitioner's brief, makes this clear:

> "* * * the referee was right in considering in connection with other facts disclosed the circumstance that the bankrupt's wife on demand by the trustee had returned to the estate a substantial part of the property conveyed to her by her husband as above stated; that such evidence was relevant on the questions whether there were assets and whether the bankrupt knew of them and intended to conceal them."

We may search the opinions in *Huntley* v. *Snider*, 86 F. (2d) 539, 88 F. (2d) 335, from beginning to end and we can find no authority for petitioner's alleged proposition of law that the evidence of such compromise shifts

the burden of proof or is justifiable ground for denial of a bankrupt's discharge. Furthermore, the record in the *Bendix* case clearly shows that the referee had before him the several compromises that had been made by the trustee with third persons. He himself had approved these compromises and entered orders upon the same. The referee considered these compromises as competent evidence in the case; otherwise he would not have admitted them. Nor did the Circuit Court of Appeals of the Seventh Circuit at any time overrule or attempt to overrule or render its decision in conflict with the opinion of *Huntley* v. *Snider,* 86 F. (2d) 539, 88 F. (2d) 335. Judge Minton, in his opinion *In re Bendix,* 127 F. (2d) 759, certainly lays down no proposition of law whatsoever in conflict therewith. We have here upon the part of counsel for petitioner an attempt to construct some ground upon which he might base a petition for writ of certiorari before this Court. We challenge counsel's statement that the decision of the Seventh Circuit Court of Appeals is squarely opposed to the ruling in the *Huntley* case. We reaffirm that these compromises of claims were fully presented to the referee, to the trial court and to the Circuit Court of Appeals, and were considered as evidence in the case, but the *Huntley* case and no other case that can be cited holds that evidence of such compromises amounts to the establishment of a continued concealment or shifts the burden of proof.

POINT B.

The Circuit Court of Appeals for the Seventh Circuit has not erroneously decided a question of importance of Illinois law in conflict with the statutes of Illinois and the decisions of the Illinois courts; and Answer to Petitioner's Argument Point II.

The proposition of law set forth on page 17 of the brief of counsel for petitioner is a correct statement, but his statement that the Court of Appeals of the Seventh Circuit in this case has rendered a decision in conflict with the Illinois statute and the Illinois decisions is incorrect. Nowhere in the opinion of the Court does it deny the right of the objecting creditor to act for all of the creditors of the Chicago Bank of Commerce in filing objections to the bankrupt's discharge. Nor does the Court hold that a representative creditor is not a proper party in the bankruptcy of a stockholder. The Court merely mentioned in this connection that the petitioner had a deposit of $85.00 in the Chicago Bank of Commerce at the time that it closed and that there were other creditors who had filed and had allowed claims against the bankrupt amounting to in excess of $2,000,000.00.

The case was decided on its merits and not on the basis of the size of the objector's claims, nor was it contended by counsel for petitioner herein in his petition for rehearing of this cause filed in the Circuit Court of Appeals of the Seventh Circuit, that the original opinion of the Court was in conflict with the statutes of the State of Illinois and of the decisions of that state. This proposition is now presented for the first time before this Honorable Court on the petition for writ of certiorari.

POINT C.

The first, second, third, fifth and sixth questions presented on page 3 of petitioner's petition and the first, second, third, fifth and sixth specification of errors on page 12 of petitioner's brief relate solely to the merits of the case and to such questions of fact that are improper for consideration on a petition to this Court for a writ of certiorari.

Respondent denies that any one of these five questions are questions proper for presentation to this Court or are involved in the issues in this case. Taking up these questions in order:

"1. Whether under Section 14 of the Bankruptcy Act (11 U.S.C. 32) a court of bankruptcy is justified in placing the burden of proof upon the objecting creditor even though a number of associates of the bankrupt have surrendered to the trustee substantial sums of cash and valuable property."

The question of burden of proof is always a question of fact and under the Bankruptcy Law is within the sound discretion of the trial court. Nowhere in this record can be found any statement or holding by the Referee, the trial judge or the Circuit Court of Appeals that the burden of proof was ever placed upon the objecting creditor, except, of course, to sustain "to the satisfaction of the Court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which under this subdivision c would prevent his discharge in bankruptcy. * * *" Bankruptcy Act, Sec. 14, 11 U.S.C. 32.

The Circuit Court of Appeals in its opinion in this case, *In re Bendix*, 127 F. (2d) 759, at 760, said:

> "If the Referee and the District Court thought there was reasonable ground to believe the bankrupt had

committed the alleged acts, then of course the burden shifted to the bankrupt to explain. That called for an exercise of discretion, after a consideration of the facts. We have no way of knowing whether the lower court considered the burden was upon the objecting creditor or upon the bankrupt."

"2. Whether under Section 14 of the Bankruptcy Act (11 U.S.C. 32) a court of bankruptcy is justified in placing the burden of proof upon the objecting creditor even though the bankrupt has, under the terms of a turnover order, been found to have made a transfer while insolvent for the purpose, and with the effect, of hindering, delaying and defrauding his creditors."

What we have said in answer to number 1 above applies equally to number 2. In addition, it should be noted that this so-called turnover order covered a transaction that had transpired more than seven years prior to the date of the filing of the petition in bankruptcy in this case, and the mere transfer, while insolvent, by a bankrupt for the purpose and with the effect of hindering, delaying and defrauding his creditors unless done within twelve months prior to the bankruptcy, is not a ground for denying the discharge in bankruptcy. *In re Doody*, 92 F. (2d) 653.

"3. Whether under the provisions of Section 14 of the Bankruptcy Act (11 U.S.C. 32) a court of bankruptcy is justified in refusing to consider assets surrendered to the trustee and assets ordered to be turned over to the trustee, as having been conveyed in fraud of creditors, as evidence of concealment of assets."

Nowhere in this record does it appear that courts below refused to consider assets turned over to the trustee and assets ordered to be turned over to the trustee as evidence of concealment of assets. In fact, the referee specifi-

cally stated at the time of the original hearing before him that he would consider and weigh all of the evidence in the case, including the evidence of compromises (Tr. 272). This proposition involves purely a question of fact.

"5. Whether a court of bankruptcy is justified in discharging a bankrupt whose books omit substantial transactions and contain material false entries."

Here again this question is purely one of evidence and of fact and has been decided by all three courts below adversely to the contention of objecting creditor. The Circuit Court of Appeals in its opinion, *In re Bendix*, 127 F. (2d) 759, at 761, said:

> "With reference to the keeping of books, the objecting creditor put on the stand the auditor employed by the trustee to audit the books of the bankrupt. The books and records were so elaborate and complete that it took the auditor and his assistants four hundred working days of seven hours each to audit the books. The auditor testified of the bankrupt and his books as follows: 'In our examination of these books we did not find any evidence of dishonesty upon the part of the bankrupt * * * All of the books that we had were in general in good shape * * * we found the differences and the books balanced out perfectly * * * he kept a substantially accurate set of books * * * I cannot give you any idea of the number of transactions that we have audited, but there were thousands of them.'
>
> "On evidence of that kind produced by the objecting creditor and not discredited or disputed, it would seem to us clear that such books met the requirement of the statute. 11 U.S.C.A. §32, sub. c.
>
> "There is no statutory mandate that books be kept. If books or records are not kept, that may be grounds

for denying a discharge. The determination of whether there have been kept such books of account of records from which the bankrupt's financial condition and business transactions might be ascertained, rests in the sound discretion of the trial court. The trial court has a wide discretion in determining whether adequate books or records were kept. That determination will not be disturbed on appeal unless there has been a clear abuse of discretion. There was no such abuse here. (Citing authorities.)"

"6. Whether a court of bankruptcy is justified in ratifying a bargain relating to the subject of discharge."

Nowhere in this record is there a scintilla of evidence supporting any such contention, nor did counsel for petitioner in any court below raise or attempt to raise any such extravagant proposition. For the first time in his petition for writ of certiorari before this Court he tries to infer or suggest that the bankrupt's discharge was bargained for and that the lower court ratified such bargain. We emphatically deny and condemn such inference.

Question presented in specification of error No. 4 is answered under Point B above.

POINT D.

Petitioner has failed to comply with Supreme Court rule No. 27, Section 8, in that he failed to accompany the filing of his brief within the time required by satisfactory proof of service upon counsel for respondent.

The records of this Court disclose that the brief in support of the petition for a writ of certiorari was presented to the Clerk of this Court on the 31st day of August, 1942, without being accompanied by satisfactory proof of service upon counsel for respondent. Service of a copy

of said brief upon counsel was not made until September 5, 1942. The petition for rehearing in this case was denied June 3, 1942. The last day for filing petition for writ of certiorari with the Clerk of this Court was September 3, 1942. Judicial Code, Title 28, Sec. 350.

Rule No. 27, Sec. 8, provides:

> "No brief, required by this rule, shall be filed by the clerk unless the same shall be accompanied by satisfactory proof of service upon counsel for the adverse party."

POINT E.

Petitioner in his petition on page 4 has failed to comply with Rule 38, Section 2, in that he has failed to set forth any reasons that can be relied upon for the allowance of the writ: (1) No reference is made to any decision of the Circuit Court of Appeals in conflict with the decision In re Bendix; (2) no claim is made that the alleged conflict with the Illinois law is a matter of importance, nor are the specific Illinois statutes or the specific decisions of the Illinois courts set forth, which are claimed to be in conflict with the decision of the Circuit Court of Appeals of the Seventh Circuit.

The mere statement of Point E above is conclusive argument that Rule 38, Section 2, of this Court has not been adhered to by counsel for petitioner, and such failure requires this Honorable Court to refer to the brief to ascertain claimed reasons relied upon for granting petition for writ of certiorari.

Answer to Petitioner's Argument Point III.

Counsel for petitioner under Point III states:

> "A discharge in bankruptcy should not be a subject of bargain and sale."

We question the propriety of counsel for petitioner to present for the first time before this Court a proposition, or an inference even, that the discharge of the bankrupt was the subject of bargain and sale. Nowhere, at any time at the hearing before the referee, on the petition for review before the District Court, or before the Circuit Court of Appeals did he venture to make such a startling assertion. Counsel appears to base his argument on this proposition on the alleged fact that the trustee in bankruptcy in this case failed to examine the bankrupt upon the hearing on objections to the bankrupt's discharge, and that certain compromises were made by this trustee with third parties. We have heretofore pointed out that the bankrupt was not a party to any of the compromises between the trustee and third parties referred to herein; that there is no evidence to show even that he knew of such compromises or that the same were being negotiated until long after their completion. The fact is that although the trustee did not file any formal objections to the bankrupt's discharge, yet in the early stages of the hearings the trustee was personally present and represented by counsel. The trustee's decision not to take a leading or aggressive role doubtless resulted from his discovery that the objecting creditor had in fact no grounds for his objection and was merely reintroducing and rearguing points that had been exhaustively considered at the first meeting of creditors, which continued over a period of six days, at which this particular objecting creditor, petitioner herein, had not elected to be present. But we submit that even if the trustee had not been present and had not participated in these proceedings and had actually been derelict in his duty, his failure cannot be considered in any way as prejudicial to the bankrupt. The argument about bargain and sale is wholly unsupported by the record and there is no factual basis for the same.

We resent the implication in the closing paragraph of counsel's brief on page 19. The facts in this case in no way disclose, as contended for by him, an intricate and clever plan for concealment of assets followed by a shrewd agreement to disgorge in part as the price of a discharge. The facts in this case are very involved. The testimony was voluminous. The hearings covered many days. Careful consideration and investigation was made by the referee. All questions were argued and briefed at great length. The referee and the trial court under the evidence exercised their discretion in holding that the bankrupt was guilty of no breach of the Bankruptcy Act, had committed no fraud, had kept proper books of account, had not concealed his assets and had satisfactorily explained the loss of his assets. The Circuit Court of Appeals of the Seventh Circuit found that the decision of the referee and the trial court was correct and affirmed their decisions.

CONCLUSION.

The questions presented by this petition for writ of certiorari go to the merits of the case and involve facts which are not pertinent to a decision by this Court.

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court, and that the petition for writ of certiorari should be denied.

Dated: September 18, 1942.

G. A. Farabaugh,
Counsel for Respondent.